



OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

LEGAL BUREAU BULLETIN

Vol. 49, No. 1

August 2019

I. SUBJECT: MARIHUANA ENFORCEMENT

A. Overview

- On August 28, 2019, the marihuana laws will change.
- It will still be illegal to possess any amount of marihuana.
- Possession of small amounts of marihuana, up to and including 2 ounces, will be a violation.
- Smoking marihuana or possessing marihuana open to public view will be downgraded from a misdemeanor to a violation.
- Possession of more than 2 ounces of marihuana will still be a misdemeanor.
- For reference, 2 ounces of marihuana is roughly equivalent to a quart sized plastic bag.

II. DISCUSSION:

A. Amendments to Penal Law

Under the current marihuana laws, it is a violation to possess any amount of marihuana up to and including 25 grams. Currently, this offense becomes a misdemeanor when one burns or possesses the marihuana open to public view. **When the new laws take effect on August 28, 2019, it will no longer matter whether the offender is burning or possessing marihuana open to public view.** Rather, the only relevant factor to determine the appropriate charge will be the amount of marihuana that the offender possesses. Under the new laws effective August 28, 2019, it will be a violation to possess any amount of marihuana up to and including two ounces, and a misdemeanor to possess more than two ounces. **Marihuana that is burning or open to public view will be charged as Unlawful Possession of Marihuana, a violation level offense.**

The amended laws will appear as follows:

<u>Amount</u>	<u>Charge</u>	<u>Level of Offense</u>	<u>Enforcement</u>
Trace amounts up to and including 1 oz.	PL 221.05 - Unlawful Possession of Marihuana in the 2nd Degree	Violation	Criminal Court Summons
More than 1 oz. up to and including 2 oz.	PL 221.10 - Unlawful Possession of Marihuana in the 1 st Degree	Violation	Criminal Court Summons
More than 2 oz. to 8 oz.	PL 221.15 – Criminal Possession of Marihuana in the 4 th Degree (This is the existing law and is <i>not</i> going to change on August 28, 2019)	Misdemeanor	Custodial Arrest

B. Implications for Marihuana Enforcement

i. Searches Incident to Arrest

When an officer arrests a suspect and takes him into custody, the officer can search the suspect and the area within the suspect's immediate control.¹ Under the existing law, smoking marihuana is a misdemeanor. Therefore, offenders are subject to a custodial arrest which permits a search incident to arrest. Once the new law goes into effect on August 28, 2019, smoking marihuana will be a violation. Officers will issue summonses instead of making custodial arrests. Generally, when a summons is issued, a search incident to arrest is not permissible.²

However, a custodial arrest for a violation level marihuana offense will still be made in certain situations. For example, the offender will be arrested and removed to the stationhouse if the offender cannot be properly identified, the offender poses a danger to the officers, the offender has an outstanding warrant, or remaining on scene endangers the officers. In such circumstances, an officer may search the offender incident to a lawful arrest.

¹ United States v. Robinson, 414 U.S. 218, 224 (1973); Arizona v. Gant, 556 U.S. 332, 335 (2009).

² Of course, an officer may frisk for weapons if they can articulate reasonable suspicion that a person is armed or dangerous. People v. Batista, 88 NY2d 650, 654 (1996). Also, note that a protective frisk is permissible when issuing a summons if the officer has "specific and reasonable safety concerns based on the facts of the encounter." Investigative Encounters, In-Service Training, Instructor's Guide, Part IIA.

ii. Street Encounters

If an officer reasonably suspects that a person possesses 2 ounces or less of marihuana, the officer can investigate by asking pointed questions and asking for consent to search.³ Since the possession is a violation, not a felony or misdemeanor as defined in the Penal Law, the person is free to leave and cannot be detained.⁴

iii. Vehicle Stops

Generally, an officer must obtain a warrant before searching a suspect or his property.⁵ However, there are several exceptions to this requirement, one of which is the automobile exception.⁶ Under the automobile exception, an officer can search a vehicle without a warrant if the officer has probable cause to believe that the vehicle contains contraband or evidence of a crime.⁷ The officer can search any part of the vehicle that could reasonably contain the object that they are looking for.⁸ This means that officers can search in relatively small spaces, like glove compartments, if they have probable cause to believe that a vehicle contains marihuana.⁹

Courts in New York have held that the automobile exception applies where an officer smells marihuana coming from a vehicle.¹⁰ **The highest court in New York State found that when officers smell marihuana coming from a vehicle, the officer may search any place in the vehicle where the marihuana could be hidden and any person inside the vehicle.** Even after the new law takes effect on August 28, 2019, this exception to the warrant requirement will still apply for two reasons.

First, an officer will still have probable cause to believe that the vehicle contains contraband. Contraband is anything that is illegal to possess.¹¹ Though the new law will make

³ Officers are reminded to complete a Consent to Search Report. If a summons is not issued, offer a contact card. In any event, provide a contact card if one is requested by the subject of the search. A stop report does not have to be completed when investigating a violation level offense. An activity log entry should be made.

⁴ See Criminal Procedure Law (“CPL”) § 140.50(1)

⁵ *Riley v. California*, 573 U.S. 373, 381-382 (2014)

⁶ See *California v. Acevedo*, 500 U.S. 565, 569 (1991)

⁷ See *Carroll v. United States*, 267 U.S. 132, 153 (1925) (holding that “contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant”); see also *Florida v. Harris*, 568 U.S. 237, 243 (2013) (noting that “a police officer has probable cause to conduct a search when ‘the facts available to [him] would warrant a [person] of reasonable caution to believe that contraband or evidence of a crime is present’”)

⁸ *United States v. Ross*, 456 U.S. 798, 825 (1982)

⁹ See *id.*

¹⁰ See e.g. *People v Chestnut*, 43 AD2d 260, 261 (3d Dept. 1974) (holding that the smell of marihuana smoke warranted a belief that an offense was being committed and that automobile contained contraband or evidence of a crime, providing probable cause to search the vehicle and its occupants). Affirmed by Court of Appeals in *People v Chestnut*, 36 N.Y.2d 971 (1975).

¹¹ Though New York courts have not decided whether a violation-level substance is contraband, other jurisdictions have. The majority of those jurisdictions have found that violation-level substances are still contraband because individuals are not allowed to possess them. See *Robinson v. State*, 451 Md 94, 99, 152 A3d 661 (2017) (holding marihuana was contraband because even though the possession of marihuana was a civil offense, one could not lawfully possess it); see also *State v. Smalley*, 233 Or App 263, 270, 225 P3d 844, 848 (2010)

the possession of 2 or fewer ounces of marihuana a violation, marihuana will still be contraband because individuals are prohibited from possessing any amount of it.

Second, an officer may search a vehicle for evidence of a crime if they have probable cause to believe that the car contains more than two ounces of marihuana.¹² To determine whether this degree of probable cause exists, an officer should consider the totality of the circumstances.¹³ For instance, in People v. Zuniga, the Colorado Supreme Court held that a state trooper had probable cause to believe the defendant's vehicle contained an illegal amount of marihuana because the occupants appeared extremely nervous, gave starkly different reasons for visiting Colorado, the trooper smelled a "heavy odor" of marihuana coming from the car, and a drug dog alerted to the vehicle.¹⁴

An officer can arrest an individual if they have probable cause to believe he was driving under the influence of marijuana.¹⁵ To determine whether probable cause exists, an officer should consider 1) the suspect's condition, appearance, balance, coordination, and manner of speech, 2) whether an odor of marihuana is coming from the suspect's vehicle, and 3) the manner in which the suspect operated the vehicle.¹⁶ However, an officer need not rely on all of these factors to establish probable cause.¹⁷ For instance, in People v. Davis, the court determined the officer had probable cause to believe that the defendant was driving under the influence when he observed the defendant driving erratically and smelled a strong odor of marihuana coming from his car.¹⁸

III. CONCLUSION:

Once the new law goes into effect on August 28, 2019, it will still be illegal to possess any amount of marihuana. The appropriate charge will be dictated by the amount possessed, not by where or how it is possessed. Whether the marihuana is burning or open to public view is no longer relevant.

Officers are reminded to familiarize themselves with the changes to the Penal Law and be aware of permissible actions in regard to vehicle stops and street encounters. Any questions regarding the changes in marihuana enforcement may be directed to the Legal Bureau at 646-610-5400, Monday – Friday from 0700 x 2300. At all other times, the on duty attorney is available through Operations at 646-610-5580.

¹² See People v. Zuniga, 372 P3d 1052, 1059-1060, 2016 CO 52, 25-30 (2016)

¹³ See id.

¹⁴ Id.

¹⁵ See People v. Fews, 27 Cal. App. 5th 553, 562, 238 Cal. Rptr. 3d 337, 344 (2018) (holding that the automobile exception applied where an officer smelled marihuana coming from the defendant's vehicle because, even though marihuana was legal to possess, it was still illegal to drive under the influence of marihuana)

¹⁶ See New York State Unified Court System Pattern Jury Instructions for VTL § 1192.4.

¹⁷ People v. Davis (Shakeema), 23 Misc. 3d 30, 32 (App Term 2009)

¹⁸ Id. at 269